RECENT CASES.

ALIENS—DEPORTATION.—An alien residing in Detroit went across the river into Canada and brought back with him a woman who he claimed was his wife. He was arrested upon a warrant issued by the Department of Commerce and Labor, for violation of the Immigration Law (Act of February 20, 1907, c. 1134, 34 Stat. 898, as amended in Act of March 26, 1910, c. 128, 36 Stat. 263, Sections 2 and 3). Later he was indicted by a Federal grand jury for the same offense. While the criminal proceedings were pending, the Secretary of the Department ordered the defendant to be deported, but a stay of the order was subsequently granted. After some time, the criminal proceedings terminated in an acquittal, but despite this the Department withdrew the stay and directed that the warrant of deportation be executed at once. Thereupon application was made for a writ of *habeas corpus* which was granted. In its return the Department contended that the court was without jurisdiction to release the alien from custody, while he insisted that the Department was without jurisdiction to issue the warrant in the first place. The court held: (1) Where the decision of the Department is a conclusion of fact, based upon evidence, it cannot be interfered with by the courts; but conclusions of law, as well as conclusions of fact based upon no evidence, are subject to review. (2) Section 3 of the Act limits the right of deportation to cases where there has been a conviction: the right to prosecute criminally and to deport are inconsistent as concurrent rights, and cannot both be exercised at the same time. Lewis v. Frick, 189 Fed. 146 (1911).

Ever since the passage of the immigration laws it has been a much disputed question just how far the courts could interfere by *habeas corpus* with deportation proceedings instituted by the Department of Commerce and Labor; but the rule as laid down by all the recent cases seems now to be settled in the form in which it is stated in the principal case. In *Ex parte* Saraceno, 182 Fed. 955 (1910), and *Ex parte* Koerner, 176 Fed. 478 (1909), the rule was similarly stated, as to conclusions of law. It was held that they are reviewable and the writ was granted. In De Bruler v. Gallo, 184 Fed. 566 (1911), United States, *ex rel.* Freeman v. Williams, 175 Fed. 274 (1910) and United States, *ex rel.* Funaro v. Watchorn, 164 Fed. 152 (1908), the rule was similarly stated as to conclusions of fact, and the writ was denied.

BANKRUPTCY—JURISDICTION.—A debtor conveyed land to a creditor, by mortgage. Within four months of the conveyance, a petition in bankruptcy was filed against him by another creditor, who alleged that the conveyance was a preferential transfer. Before the adjudication, and before any receiver had been appointed, the mortgagee's assignee brought suit, in the state court, to foreclose the mortgage. The petitioning creditor then asked the bankruptcy court to enjoin the foreclosure proceedings. *Held*, the filing of the petition brings into the jurisdiction of the bankruptcy court all property in the possession of the alleged bankrupt at the time, and the court may enjoin all proceedings in other courts, started subsequently, to foreclose liens whether admitted or in dispute. *In re* Donnelly, 188 Fed. 1001 (1910).

A court of bankruptcy may lawfully grant such restraining order, operative on and binding litigants in the state court, although strangers to the bankruptcy proceedings, as may be necessary for the enforcement of the provisions of the bankruptcy act. *In re* Hornstein, 122 Fed. 266 (1903). The fact that the bankruptcy court may not yet have made an adjudication, and that no receiver or trustee has yet been appointed is immaterial. *In re* Weinger, Bergman & Co., 126 Fed. 875 (1903). The filing of a petition in bankruptcy places the property of the bankrupt constructively in the custody

of the court of bankruptcy. *In re* Jersey Island Packing Co., 138 Fed. 625 (1905). Even before adjudication it *is in custodia legis* and under the sole and exclusive jurisdiction and control of the bankruptcy court. *In re* Duncan, 148 Fed. 464 (1906).

The cases which deny the jurisdiction of the bankruptcy court to enjoin proceedings in other courts, affecting the bankrupt's property, are cases in which the actions in the other courts were begun prior to the time of the filing of the petition. Such are *In re* Wells, 114 Fed. 222 (1902), and Clark v. Norwalk Steel & Iron Co., 188 Fed. 999 (1910).

BANKRUPTCY—SALE OR TRANSFER OF BUSINESS—GOOD WILL—USE OF NAME.—A chain of grocery stores owned by R. B. Reilly and known as "Reilly's" passed into the hands of a receiver in bankruptcy. He sold all his interest in them to the plaintiff, who continued to operate them, but not under the name of "Reilly's." Defendant, a former employe of R. B. Reilly, started up a rival chain of stores, calling them "Reilly's." Plaintiff asked to have defendant enjoined from using the name "Reilly's." The court held that the good will of a business is transferable in bankruptcy proceedings, and includes the use of the trade-name. Although a forced sale does not estop the former owner from re-entering the same business under the same name, it conveys upon a third party no more right to use the name than a voluntary sale would. James van Dyk Co. v. F. V. Reilly Co., 130 N. Y. Sup. 755 (1911).

In a voluntary sale, one who sells the good will of a business can assign the trade-marks used in connection with the business, Warren v. Warren Thread Co., 134 Mass. 247 (1883), even though the trade-mark is the name of the assignor, Hoxie v. Chaney, 143 Mass. 592 (1887); and the assignee of the good will can restrain the assignor from using his own name again in the conduct of a similar business, Churton v. Douglas, John. 174 (1859). *A fortiori,* he can restrain a third party.

By most bankruptcy statutes, the assignee receives the bankrupt's whole title and interest in property conveyed for the benefit of creditors. The Federal Act of 1898, Section 70, Paragraph 6, says: "The trustee [or receiver] takes title to all property of the bankrupt, which, prior to the filing of the petition, the latter could by any means have transferred." Accordingly, it is held in practically all jurisdictions that the right to use a person's name as a trade-mark passes to his assignee in bankruptcy. Hegeman & Co. v. Hegeman, 8 Daly 1 (N. Y., 1880); Lothrop Publishing Co. v. Lothrop, Lee & Shephard Co., 191 Mass. 353 (1906); Fish Bros. Wagon Co. v. Fish, 82 Wis. 546 (1892). In Kentucky, however, it has been held that it does not pass. Mattingly v. Stone, 12 S. W. 467 (Ky. 1889).

The dictum in the principal case anent forced sales is based upon a passage in the opinion of Bartlett, J., in Von Bremen v. MacMonnies, 200 N. Y. 41, 51 (1910), which is similarly *obiter.* No other authority can be found for it. The dictum in the principal case is, furthermore, an extension of the earlier dictum, which merely discussed solicitation of trade from the old customers by the old business, after a transfer of the good will *in invitum.*

CARRIERS—LIMITATION OF LIABILITY FOR NEGLIGENCE.—The plaintiff shipped a carload of automobiles over the defendant's railroad, expressly agreeing, in order to limit the defendant's liability for negligence, that the value of the shipment was fifty dollars. In this way he secured a lower rate of freight. The defendant negligently lost the shipment and the plaintiff sued for the real value. It was held that it would be a violation of public policy to permit a shipper, who has benefited by the value deliberately agreed upon, to repudiate his agreement, and recover on a higher valuation. Pierce Company v. Wells, Fargo Co., 189 Fed. 561 (1911).

Contracts limiting the amount of a carrier's liability for negligence have

been upheld in numerous jurisdictions, where fairly made and just and reasonable in their terms. Boorman v. Amer. Exp. Co., 21 Wis, 154 (1866); Oppenheimer v. U. S. Exp. Co., 69 Ill. 62 (1873); Squire v. N. Y. C. R. Co., 98 Mass. 239 (1867); Hohl v. Norddeutscher Lloyd, 175 Fed. 544 (1910); Hart v. Penna. R. R. Co., 112 U. S. 331 (1884); Belger v. Dinsmore, 51 N. Y. 166 (1872). But many courts hold them to be against public policy. Grogan v. Adams Ex., Co., 114 Pa. 523 (1886); B. & O. S. W. Ry. v. Ragsdale, 14 Ind. App. 406 (1896); Baughman v. Louisville, &c., Ry., 94 Ky. 150 (1893); Conover v. Pac. Exp. Co., 40 Mo. App. 31 (1890). Some courts deny the validity of the limitation where it is not fixed with reference to the value of the goods, or where the value is obviously greater than the amount fixed. U. S. Exp. Co. v. Backman, 28 Ohio St. 144 (1875); Moulton v. St. P., &c., Co., 31 Minn. 85 (1883); Levy v. So. Exp. Co., 4 S. C. 234 (1872). Where no opportunity was given the shipper to pay a proportionately higher rate for a full assumption of liability, the limitation was held void. The Kensington, 183 U. S. 263 (1902).

The very low agreed value and the obviously great real value of the automobiles take the principal case a step beyond the previous decisions. It is in reality in conflict with the rule existing in most jurisdictions, that a carrier may not stipulate for an absolute release from liability for negligence. Calderon v. Atlas S. S. Company, 170 U. S. 272 (1897); School Dist. v. R. R., 102 Mass. 552 (1869); Amer. Ex. Co. v. Bank, 69 Pa. 394 (1871); *Contra,* Belger v. Dinsmore, (N. Y.), *supra;* Hale v. N. J., &c., Ry., 15 Conn. 539 (1843); Adams Exp. Co. v. Stettaners, 61 Ill. 184 (1871).

CONTRACTS—ACCORD AND SATISFACTION—ACCEPTANCE OF CHECK FOR DISPUTED CLAIM.—In Siegel v. Des Moines Mutual Hail Insurance Association, 132 N. W. 697 (S. Dakota, 1911), the plaintiff sued to recover a balance claimed to be due upon a hail insurance policy. The adjustment of the loss was in dispute. The insurance company sent a check to the assured for an amount which they insisted was all that was due him. The check recited on its face: "This check accepted as payment in full for all claims to date." The plaintiff cashed it with this indorsement: "Accepted in part payment of loss by payee." The court held that even if the check had been cashed without any attempt to qualify its acceptance, the transaction would not have amounted to an accord and satisfaction, as there was absolutely no consideration therefor. The Code provision (Sec. 1180): "Part performance of an obligation, when expressly accepted by the creditor in writing, in satisfaction, though without any new consideration, extinguishes the obligation," was held not to apply. The check was not accepted in writing in satisfaction of the disputed claim; the assured, by his act, refused to so accept the same.

The authorities differ as to the legal effect of the transaction in the principal case. The English Court of Appeal in Day v. McLea, 22 Q. B. D. 610, held that there was no satisfaction of the cause of action. This has been followed in a few American jurisdictions. Louisville, etc., Ry. Co. v. Helme, 22 Ky. L. Rep. 964 (1900). But the great weight of authority in the United States is to the contrary. Most of the cases hold that the acceptance of the check necessarily involves an acceptance of the condition upon which it was tendered, unless the debtor assented to the creditor's refusal of the conditions. Nassory v. Tomlinson, 148 N. Y. 326 (1896); Hall v. Johnson, 22 R. I. 66 (1900). See also an article by Samuel Williston on "Accord and Satisfaction," 17 Har. L. Rev. 459, and Phila. B. & W. R. Co. v. Walker, 45 Pa. Super. Ct. 524 (1911).

CONTRACTS—BREACH OF PROMISE TO MARRY—DAMAGES—AGGRAVATION.—The defendant promised to marry the plaintiff, and by means of that promise obtained her consent to sexual intercourse. Later he broke his promise, and she sued him for breach of promise, alleging her seduction as a ground for

additional damages. It was held that a woman suing for breach of promise of marriage may recover additional compensation for her seduction by means of that promise. Stokes v. Mason, 81 Atl. Rep. 162 (Vermont, 1911).

There is a distinct cleavage of opinion on this point. In some states, the old common law rule that a woman cannot recover damages for her own seduction, because she is *particeps criminis*, has been applied to suits for breach of promise. Those courts argue that to allow aggravation of damages for seduction would be to permit indirectly a recovery for an act for which the law denies recovery. Weaver v. Bachert, 2 Pa. 80 (1845), which is approved as lately as Gring v. Lerch, 112 Pa. 250 (1886); Wrynn v. Downey, 27 R. I. 454 (1906).

But in most states a woman is allowed to prove seduction in aggravation of damages for a breach of marriage promise. Anderson v. Kirby, 125 Ga. 62 (1906); Kelley v. Price, 106 Mass. 339 (1871). In many states the rule is that the jury may take the fact of seduction into consideration in assessing damages. Dubbs v. Van Kleek, 12 Ill. 446 (1851); Sauer v. Schulenberg, 33 Md. 288 (1870); Kniffen v. McConnell, 30 N. Y. 285 (1864).

CRIMES—DISTINCTION BETWEEN LARCENY AND FALSE PRETENSE.—Complainant agreed to put up money for the defendant in a fraudulent betting game with the understanding that his money would be returned to him. During a discussion over the framed-up race which had been lost by the defendant's horse, the cry of "police" was raised and the defendant and his confederate, the stakeholder, went off with the money. The defendant was held guilty of larceny. State v. Robbins, 132 N. W. Rep. 805 (Iowa, 1911).

The jury found that when the complainant gave his money over to the stakeholder he did not intend to pass title to it, but understood that the defendant was to pay him back, and this whether the defendant won or lost the bet. The possession of the money having been obtained by fraud, and there being no intention on the part of the complainant to divest himself of his property in the money, the defendant was properly convicted of larceny. State v. Donaldson, 99 Pac. Rep. 447 (Utah, 1909); State v. Ryan, 1 L. R. A. 862 (Oregon, 1905).

While under the facts as found by the jury in State v. Robbins, *supra*, the decision has abundant support, the refusal of the court to charge as requested that "if complainant delivered the money to the stakeholder intending thereby to pass title, no matter by what deception that intent was induced, the crime would not be larceny," would seem to be contrary to the principle laid down in many of the cases. The Am. & Eng. Ency. of Law in discussing the early case of King v. Nicholson, 2 Leach, C. L. (1794), states (Vol. 18, 2d Ed., page 48): "A distinction is to be noted between apparently winning a bet by fraudulent means, and inducing a party to deposit money on a bet, merely as a means of getting possession of it." Johnson v. State, 75 Ark. 427 (1905), holds that "if complainant bet his money to win or lose, thereby intending to pass title to it, even though pursuant to a conspiracy inducing him to do so by false representations, yet that would not be larceny." *Accord:* Williams v. State, 34 Tex. 558 (1871).

The court in State v. Skillbrick, 25 Wash. 555 (1901), managed to convict the defendant in a case similar to Johnson v. State, *supra*, on the ground that the loser never intended to part with his money unless it was fairly won. This is clearly wrong, the court, in reaching its conclusion, having completely lost sight of the elements of larceny.

CRIMES—WHEN KILLING A DOG IS JUSTIFIABLE.—The owner of a number of turkeys found a dog running back and forth in the street outside his yard, barking and snapping at the turkeys inside and frightening them; but he was prevented from entering the yard by a strong fence. The defendant thereupon killed the dog. He was later convicted of a misdemeanor under a statute making it wrongful "to wilfully injure or cruelly kill any useful

animal." The conviction was sustained on the ground that such a killing could be justified only on the ground of its being necessary to prevent the destruction of property attacked by the dog. State v. Smith, 72 S. E. 321 (N. C. 1911).

There has always been much litigation over dogs from the earliest times. At common law, the dog was not considered property in the sense that he could be the subject of larceny. 2 Bl. Com. 393. Yet the owner was recognized as having a sufficient property interest in the dog to be able to sustain an action for damages for an unjustifiable killing. Wright v. Ramscot, 1 Saund. 84 (England, 1667). The wanton killing or malicious injury of a dog is punished both at common law and by statutes in nearly every jurisdiction.

A man is justified, however, in killing a dog when the destruction of property cannot be prevented in any other way. Vere v. Cawdor, 11 East, 595 (England, 1809); Woolf v. Chalker, 31 Conn. 121 (1862); Harrington v. Hall, 63 Atl. 875 (Del. 1906). The question of justification is for the jury. McChesney v. Wilson, 132 Mich. 252 (1903). The killing must be while the dog is in the act of committing the depredation or is just about to jump on his prey. It can be neither by way of anticipation nor revenge. Boecher v. Lutz, 2 City Ct. R. 205 (N. Y. 1885); Chapman v. Decrow, 93 Me. 378 (1899). As is said by Walker, J., in State v. Smith, *supra*: "It is not the dog's predatory habits, nor his past transgression, nor his reputation, however bad, but the doctrine of self-defense, whether of person or of property, that gives the right to kill"

EVIDENCE—COMPETENCY OF WIFE AS A WITNESS AGAINST HER HUSBAND.—In United States v. Rispoli, 189 Fed. 271 (1911), defendant was indicted under a Federal statute for knowingly persuading a woman to go from one state to another, there to engage in immoral practices. The woman was compelled to testify against the defendant, despite the objection that he was her husband, on the ground that the defendant was charged with an offense against the wife's person.

The general rule is that husband and wife are incompetent witnesses either for or against each other while the marriage relation lasts. Lucas v. State, 23 Conn. 18 (1854); Wilke v. People, 53 N. Y. 525 (1873); Schultz v. State, 32 Ohio St. 276 (1877). There is an exception to the general rule, where husband or wife has inflicted an injury against the person of the other, the one so injured may testify against the other. Soules' Case, 5 Me. 407 (1828); Harmon v. State, 63 Md. 123 (1884); Commonwealth v. Murphy, 86 Mass. 491 (1862). As to what constitutes such an injury to the person as to bring a case within this exception jurisdictions differ. Indecent assault on her child is not such an injury as will allow a wife to testify. People v. Westbrook, 94 Mich. 629 (1893). In a prosecution against a wife for adultery the husband may testify. This is held an injury to him. State v. Bennet, 31 Iowa, 34 (1871). *Contra:* McLean v. State, 32 Tex. Cr. R. 521 (1894).

EVIDENCE—EXPERT TESTIMONY ON THE PROBABLE VALUE OF CONDEMNED LAND.—A city condemned certain land, through the exercise of the right of eminent domain, for the purpose of extending its water supply. The amount of damages awarded to the owner of the land was based upon the fair market value of the land, in view of its situation, its water resources, and its proximity to the city and other large communities. In order to determine the value of this property the opinions of experts were admitted. These opinions were not based upon actual knowledge of market values, but upon the resources of the property, and upon an estimate of what such property would probably bring in the market if its peculiar situation and its intrinsic qualities and properties were fully understood and known. City of Woburn v. Adams, 178 Fed. 781 (1911).

The ground for the admission of such evidence was the necessity of the

case. The court held that, on account of the absolute right to take and the duty to surrender, the rules of evidence must be somewhat relaxed. The objection to this class of evidence is that it involves collateral issues, and its admission depends upon the discretion of the court.

The question of the admissability of evidence of this kind has been discussed in three cases in the Supreme Court of Massachussets. In all of them the decision of the lower court was sustained. Cochrane v. Com., 175 Mass. 299 (1900); Conness v. Commonwealth, 184 Mass. 541 (1904); Sargent v. Merrimac, 196 Mass. 171 (1907). In the last case the evidence was excluded by the judge in the court below, and while the Supreme Court recognized the soundness of the previous decisions it questioned the advisability of the admission of such evidence, quoting from Conmess v. Commonwealth: "It would have been a better exercise of judicial discretion if the testimony . . . had been excluded."

Another case in which the point raised in the principal case arose was The Sanitary District of Chicago v. P. Ft. W. & C. R. R. Co., 216 Ill. 575 (1905). A railroad terminal was condemned, and the opinion of a witness, who knew the value of the terminal, was admitted in evidence, even though he was not familiar with the market value of property in the vicinity

The competency of a witness to testify as to the market value of property depends upon his knowledge of values in the particular locality and the extent of his experience regarding real estate. Ryman v. Boston, 164 Mass. 99 (1895). The case of Michael v. Crescent Pipe Line Co., 159 Pa. 99 (1893), states the ordinary qualifications of witnesses to give opinions as to the market value of land to be that they should affirmatively appear to have actual personal knowledge of the market value of the land, estimated upon a fair consideration of the land, the extent and condition of its improvements, its quantity and productive qualities and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood at the time.

EVIDENCE—MEMORANDA TO REFRESH THE WITNESS'S MEMORY.—To what sort of memoranda may a witness on the stand refer to refresh his recollection before testifying? A recent Indiana case considers this question and answers it most unsatisfactorily. The action was for the price of lumber sold to a building contractor, and the witness was a driver in the employ of the lumber company. Whenever he took a load of lumber from the yard he was handed a slip which the purchaser should sign on delivery. It seems that, as the lumber was unloaded, the purchaser would check the slip to see that the quantities were correct. On trial, the driver, as witness, was allowed to look at one of these slips to see what amount it called for, and then to state how much lumber he delivered on that trip. *Held:* That the witness was properly allowed to refresh his memory from this slip, even though the objection was made that he, himself, did not make nor verify the same and was not present when it was made. Federal Co. v. Indiana Lumber Co., 95 N. E. Rep. 1104 (Ind. 1911).

The conclusion reached by both the trial court and the appellate court in this case does not seem to be well grounded on the established rules of evidence A memorandum, in order to be free from objection, must belong to one of three classes. First, it may be some instrument, book, or other writing prepared by the witness, himself. Pierce v. Ry. Co., 94 Me. 171 (1900); Athens Co. v. Elsbree, 19 Pa. Super. 618 (1902); Foley v. State, 11 Wyo. 464 (1903); Myers v. Weger, 62 N. J. L. 432 (1899). Second, the writing may be one which was made in the presence, or with the knowledge of the witness by another. Flint v. Kennedy, 33 Fed. 820 (1888); Taussig v. Schields, 26 Mo. App. 318 (1887); State v. Teachey, 138 N. C. 587 (1905). Third, the writing may be made by another, if the truth of its statements is

verified by the witness. Com. v. Ford, 130 Mass. 64 (1881); Taft v. Little, 178 N. Y. 127 (1904).

In the principal case the memorandum used by the witness did not come under any of these classes and ought, it seems, to have been disregarded as purely hearsay.

INSURANCE—AVOIDANCE FOR FRAUD—RETURN OF PREMIUM.—The beneficiary in a policy of life insurance brought suit upon it. False and fraudulent information had been given by the insured before the policy was issued. The insurer relied upon a clause in the policy avoiding the policy and forfeiting the premium in such event. The beneficiary claimed that the insurer knew of the falsity when issuing the policy. *Held:* Such a clause does not render the policy void, but voidable at the election of the insurer. The premiums should have been tendered back, as a necessary part of such election. Commercial Life Ins. Co. v. Schoyer, 95 N. E. Rep. 1004 (Ind. 1911). *Accord:* Glens Falls Ins. Co. v. Michael, 74 N. E. 964 (Ind. 1905); State Life Ins. Co. v. Jones, 92 N. E. 879 (Ind. 1910); Fishbeck v. Ins. Co., 54 Cal. 422 (1880); Harris v. Society, 64 N. Y. 196 (1876).

The retention of premiums has been held an election to treat the policy as valid. Georgia Home Ins. Co. v. Rosenfield, 96 Fed. 358 (1899). So also where premiums were received after forfeiture. Met. Life Ins. Co. v. McTague, 49 N. J. L. 589 (1887).

Generally, where the policy is void *ab initio,* and no risk has attached, as in case of a breach of warranty, want of interest or illegality, the premiums are returnable. Kabok v. Phoenix Mut. Co., 21 N. Y. 203 (1889); Conn. Mut. Co. v. Pyle, 44 Ohio St. 19 (1886); Foster v. Ins. Co., 11 Pick. 85 (Mass. 1831). But otherwise, where the policy is void through the active fraud of the assured. Hoyt v. Gilman, 8 Mass. 335 (1811); Lewis v. Ins. Co., 39 Conn. 100 (1872); Duncan v. Nat. Mut. F. I. Co., 98 Pac. 634 (Cal., 1908); Met. Life Ins. Co. v. McTague, *supra;* Ins. Co. v. Smith, 92 Fed. 503 (1899).

MUNICIPAL CORPORATIONS—TORT LIABILITY OF A CITY.—A municipality is not liable for torts committed by any of its officers, unless made so by statute, whether committed in the exercise of governmental functions, or in the conduct of a business by the municipality for its financial benefit. But a statute permitting one injured through a defect in a street to secure damages therefor, makes the municipality liable for injuries resulting from a wire which falls from the city's electric lighting plant into the street, and thereby makes the highway unsafe. Irvine v. Town of Greenwood, 72 S. E. Rep. 228 (S. C. 1911).

It should be noted that the defendant was held liable, not because of negligence in the operation of its municipal lighting plant, but simply because the broken live wire obstructed the highway and made it dangerous, the court holding that the broken wire constituted a defect in the highway. In accordance with this interpretation, if the deceased had been killed by the same wire falling in his own yard he would have been unable to recover; or a pedestrian would have an action for injuries sustained by reason of a city watermain bursting in the street and injuring him, but none if the same main should burst in his own house.

The court decided that the maintenance of a municipal electric lighting plant—a power conferred upon the city by the General Assembly—was not subject to the same legal rules as a private business enterprise; that such an enterprise is, in reality, of the same nature as a governmental function, and hence the municipality which operates it is not liable for the torts of the power company unless made so by statute, and that municipal corporations are created primarily for public and governmental purposes, and not for the benefit of either the city or the individual.

This rule, however, would appear to be too broad in regard to enterprises of this character. The better rule seems to be that such *quasi* municipal corporations as city electric lighting plants should be impliedly liable for wrongful acts done in their private character and from which they derive some special advantage or endowment. They should not, however, in the absence of a statute be responsible for torts occurring in their public capacity as part of the governmental agencies of the state and arising in the discharge of duties imposed upon them for the public or general, and not the corporate, benefit. See the leading case of Bailey v. New York, 3 Hill 531 (N. Y., 1843), which is the basis of a long line of decisions in different jurisdictions; and for a discussion of the subject of the implied liability of a municipal corporation for the neglect of a public duty resulting in special damage to the individual, see the convincing opinion of Gray, C. J., in Hill v. Boston, 122 Mass. 381 (1877). Also 4 Dillon on Municipal Corporations, 5th Ed., Sections 1642-1646.

PROPERTY—EFFECT OF A CROP AGREEMENT.—A life tenant "let" land to another for an indefinite time, to cultivate. The life tenant remained in possession of the premises and was to receive "as belonging to her," one-third of the crop. The farmer was to take the balance "in payment for work and labor and expenses incurred." The life tenant died before the crop matured. The remainderman claimed her share, as rent becoming due after her death. The court held that the words of the contract evidenced a mere cropping agreement, and not a lease. The life tenant and the farmer were tenants in common of the crop; and the life tenant's share belonged to her personal representative. Frame's Estate v. Frame, 96 N. E. Rep. 35 (Ind., 1911).

The precise nature of the interest of parties to a contract to cultivate land on shares, is controlled by the provisions of the contract. Warren v. Abbey, 112 Mass. 355 (1873). In a few jurisdictions the ordinary contract of letting on shares is held to establish the relation of landlord and tenant. Clark v. Cobb, 121 Cal. 595 (1898); Wentworth v. Portsmouth Co., 55 N. H. 540 (1875); Cooper v. McGraw, 8 Ore. 327 (1880). Where the owner retains the right to come on the premises, such a contract is usually regarded as constituting the parties tenants in common of the crops, but not joint tenants of the land. Richards v. Wardwell, 82 Me. 343 (1889); Loomis v. O'Neal, 73 Mich. 582 (1889); Taylor v. Bradley, 39 N. Y. 129 (1868). But where exclusive possession was given and the share of the crop was reserved as rent *co nomine,* the relation of landlord and tenant is held to exist. Reeves v. Hannon, 65 N. J. L. 249 (1900); Warner v. Abbey (Mass.),*supra;* Steel v. Frick, 56 Pa. 172 (1867); Taylor v. Bradley (N. Y.), *supra,* Birmingham v. Rogers, 46 Ark. 254 (1885), required a clear contrary intention to appear in the agreement, to avoid the relation of landlord and tenant. Under a statute, the parties were held to be landlord and tenant where one furnished the land and the other the labor and teams to cultivate it. Kilpatrick v. Harper, 119 Ala. 452 (1898); Redmon v. Bedford, 80 Ky. 13 (1882). But where the labor only was to be furnished, it was held to be a contract of hire. Jordan v. Lindsay, 132 Ala. 567 (1901). In Harrison v. Rich, 71 N. C. 7 (1874) the possession of a cropper was held to be only the possession of a servant. The parties may, however, so agree as to constitute a partnership. Somers v. Joyce, 40 Conn. 592 (1873); Autrey v. Frieze, 59 Ala. 587 (1877).

REAL PROPERTY—COVENANT OF INDEMNITY IN A LEASE.—The owner of premises suitable only for use as a saloon, leased them for that purpose to a tenant, who covenanted to save the owner harmless from any penalty for violation of the liquor laws. The license to sell liquor on the demised premises was rescinded for a year, because of a violation, by a sub-tenant, of a

statute passed after the making of the original lease. The owner sued to recover rent from the original lessee, for the year that the premises could not be let. *Held:* Since the penalty was created after the making of the lease, the parties did not contract in contemplation of it, and the covenantor was not liable. Mudge v. West End Brewing Co., 130 N. Y. Sup. 350 (1911).

Somewhat analogous to the principal case, are the cases where, by reason of a change in the law, performance of a contract becomes impossible. It is generally held, in this event, that the parties are relieved from performance. Cordes v. Miller, 39 Mich. 581 (1878); Baylies v. Fettyplace, 7 Mass. 325, 328 (1811); M. & T. R. R. v. Green, 56 Tenn. 588, 593 (1872); Sauner v. Phœnix Co., 41 Mo. App. 480 (1890). But in Berwick v. Oswald, 3 E. & B. 665 (1854), a surety on an official bond was held to be bound, although the conditions of holding office had been changed by statute after the contract of suretyship was made. There was, however, a strong dissent on the ground that a contract must be considered to be made with reference to the existing law, unless the words clearly show a contrary intention.

Of course, in the principal case there was nothing to show the impossibility of observing the law, and, by so doing, keeping the terms of the covenant. It is quite possible, however, that the conditions attending the conduct of the business in question, may have been so altered by the statute enacted subsequent to the covenant, as to have materially affected the likelihood of a profitable venture, which may be assumed to have been the motive for making the lease and covenant incident thereto. *Quaere:* Ought this to excuse breach of a covenant to keep the laws; a duty which public policy demands of every citizen regardless of any covenant?

TORTS—INTERFERENCE WITH BUSINESS.—The defendant, in an action for interference with business, may not, on the plea of competition, justify its malicious removal from windows of cards, which the plaintiff, a retailer of oil from tank wagons, has left with customers to display in their windows when they desire him to call with oil, merely because such display of the cards is not a contract and does not amount to an order on the plaintiff. Dunshee v. Standard Oil Co., *et al.*, 132 N. W. Rep. 371 (Ia., 1911).

This case is interesting as indicative of the modern tendency of the courts to protect, as far as possible, an individual operator from malicious interference directed against his business. The defendant was the Standard Oil Co., which had entered upon a systematic campaign of underselling against the plaintiff in order to drive him out of business; and the act complained of was merely one of several ways in which they had interfered with his trade. The court held that in such a case, besides the actual damages for malicious interference with his business, the jury may award the plaintiff exemplary damages.

The decision is another specific application of the rule laid down in Walker v. Cronin, 107 Mass. 555 (1871), that everyone has a right to enjoy the rewards of his own enterprise; and, while he has no right to be protected against competition, nevertheless he has the right to be free from malicious and wanton disturbance. Losses resulting from competition are, in general, "*damnum absque injuria*"; but losses occasioned by merely wanton or malicious acts, without the justification of competition or the service of any interest or lawful purpose, are injuries for which an action will lie.

TORTS—NEGLIGENCE—LIABILITY TO INFANT TRESPASSERS.—In Barker v. Herbert, 2 K. B. (1911) 633, the defendant was the owner in possession of certain premises with an area adjoining the street. The owner was in the habit of visiting the premises weekly. On the day following one of his visits, some boys broke part of the area railing. Before the owner learned of the dangerous condition of the premises, the plaintiff, a child, crawled

through the gap and in clambering along a slate ledge fell into the areaway and was injured. It was held that there could be no recovery unless it was shown either that the defendant himself, or some person for whose action he was responsible, created the danger which constituted the nuisance; or that he had neglected to remove the danger or nuisance for an undue time after he became aware of it, or, if he had used reasonable care, ought to have become aware of it.

It has long been recognized that there is no duty to protect an ordinary trespasser. Blyth v. Topham, 2 Cooke Jac. 158 (1608); Thompson Negligence, Sec. 205. Where, however, the owner of land maintains his premises close to the highway in such a condition that one making a false step or being affected by sudden giddiness might be injured, it is reasonable that the landowner should be liable for the consequences. Hardcastle v. South Yorkshire Rwy., 28 L. J. R. 139 (1859). However, the nuisance must be the proximate cause of the injury to allow recovery. Honnsell v. Smyth, 7 C. B. N. S. 731 (1860); Harrold v. Watney, (1898), 2 Q. B. 320. See also 26 L. R. A. 686; 5 L. R. A. N. S. 732.

If then there is no liability to an ordinary trespasser, is the plaintiff's case strengthened by virtue of the fact that he is an infant? The doctrine favoring infant trespassers has been recognized in England, Cooke v. Midland Railway, 1909 A. C. 229, and to some extent in the United States. 5 Ann. Cas. 503; 7 Ann. Cas. 201. The essential fact for recovery in such cases, however, is that the landowner had knowledge or should have had knowledge of the dangerous condition and the probability of the trespass. Beven Negligence, 3rd Ed., 428; Jewson v. Gatti, 2 Times L. J. 1886, 441; 11 Ann. Cas. 901.

The reasoning of the case is sound and the decision is consonant with well-established principles. See Silverton v. Marriott, 9 L. T. N. S. 61 (1888); McIntire v. Roberts, 149 Mass. 450 (1889).

TORTS—NEGLIGENCE—LIABILITY FOR DEPOSITING EXPLOSIVES ON A DUMPING GROUND FREQUENTED BY CHILDREN.—The plaintiff, a boy of twelve, lit and was injured by, an explosive which had been deposited by the defendant on a dumping ground on which children were accustomed to play. The Supreme Court of Pennsylvania, in Carpenter v. Miller and Son, 232 Pa. 362 (1911) held that the defendant's negligence was not the proximate cause of the injury. The intervening act of the plaintiff was the cause; and the defendant could not have foreseen the injury.

It is not necessary, in order that the negligence of the defendant be considered the proximate cause of the injury, that the exact injury or the exact manner in which it occurred should have been foreseen, but only that a person of reasonable caution and prudence should have anticipated that some injury would likely result. Coolidge v. Hallaner, 126 Wis. 244 (1905); Railway Co. v. Parry, 67 Kan. 515 (1903). The general rule is that where an independent intervening cause interrupts the natural sequence and causal connection between the original act of negligence and the injury, the intervening cause becomes the proximate cause and the author of the negligence is not liable. Finkbeiner v. Soloman, 225 Pa. 333 (1909); Tutein v. Hurley, 98 Mass. 211 (1867). But children must be expected to act upon childish instinct, and impulses. If therefore a person leaves exposed a dangerous article, by nature attractive to children, he takes the risk of having them injure themselves or others by playing with it. Sullivan v. Creed, Ir. R. 1904, 2 K. B. 317; Williams v. Early, 10 Times L. R. 41 (1903); Harriman v. Railway Co., 45 Ohio St. 11 (1887); Powers v. Harlow, 53 Mich. 507 (1884); Rachmel v. Clark, 205 Pa. 314 (1903). It would seem, therefore, that the decision in the principal case is at least questionable, especially in view of the fact that the explosive from which the injury resulted was, in form, a defective piece of fire-works.

TORTS—NEGLIGENCE—RELATIVE RIGHTS OF AUTOMOBILES AND PEDESTRIANS.—In Smith v. Coon, 132 N. W. Rep. 535 (Neb., 1911), deceased while traversing a busy crossing was so bewildered upon seeing the defendants's automobile speeding towards her that she was unable to avoid being struck. The defendant failed to slow up or give warning of his approach. He contended that he did not see the deceased. The court held that he was bound to see a person who was crossing the street directly in front of him; and that if his automobile approached at such an excessive speed as to bewilder the deceased, it was properly left to the jury to decide whether she was negligent.

The law governing the use of automobiles is closely similar to that governing the use of all other vehicles upon the highways. Pedestrians and automobiles have equal rights; but the right of each must be exercised with due regard for the right of the other. Simeone v. Lindsay, 6 Pennewell 224 (Del. 1907); Indiana Springs Co. v. Brown, 165 Ind. 465 (1905). The presence of pedestrians must be anticipated anywhere in the street; and it is not negligence, *per se,* to cross a street at a place other than the regular crossing. Stringer v. Frost, 116 Ind. 477 (1888); Thies v. Thomas, 77 N. Y. Sup. 276 (1902). A pedestrian about to cross a street is not bound, as a matter of law, to stop, look, and listen as in crossing a railroad track, Millsapo v. Brogdon, 134 S. W. 632 (Ark., 1911); nor is he bound to be constantly looking for approaching vehicles. Hennessy v. Taylor, 189 Mass. 583 (1905). A person alighting from a trolley car is bound immediately to look for approaching vehicles, Kauffman v. Nelson, 225 Pa. 174 (1909); but he is not bound to look both ways. N. Y. Transportation Co. v. Garside, 157 Fed. 521 (1907).

In deciding that where a person runs into danger because of terror in seeing his peril, he is not conclusively guilty of contributory negligence, the principal case is in accord with the weight of authority. McFern v. Gardner, 121 Mo. App. 1 (1906); Simeone v. Lindsay, *supra.* But Navailles v. Dillman, 124 La. 421 (1909), holds, as a matter of law, that it is not contributory negligence.

WILLS—FAILURE TO DESCRIBE THE SUBJECT-MATTER OF A GIFT.—THE testator made a holographic will, properly signed and executed, providing that all his lawful debts be paid and then reciting that he gave, devised and bequeathed "unto my living son and daughter named, share and share alike the same to be equally divided between themselves," and further providing that all real estate owned by him which could not be sold at a fair market price should be sold at auction. *Held,* that the will was void for failure to mention or describe the subject of the intended gift. Dreyer v. Reisman, 96 N. E. Rep. 90 (N. Y., 1911).

It is interesting to note that the five Judges of the Supreme Court, sitting as the Appellate Division, unanimously held the instrument under discussion a valid will, while the Court of Appeals unanimously decided that it was void. The Supreme Court based their decision on The Matter of Bassett, L. R. 14 (Eq. Cas.) 54 (1872), the facts of which while not exactly similar, are sufficiently so to afford a precedent. By holding the instrument not a will, the higher court permitted the testator's grandson, who had not been mentioned, to share in the estate under the intestate laws. Upon a strict interpretation of the law the case is undoubtedly correctly decided.

It is generally held that courts may transfer or even insert words or phrases in order to effectuate an intent that was, with reasonable certainty to be gathered from the context of the whole instrument. Hope v. Potter, 3 K. & J. 208 (1857); Jarman on Wills, 3d Edition, 456, and cases cited. But where such transposition or insertion will as in our principal case, result in the disinherison of an heir the change ought not to be made. Doe v. Dring, 2 Maule & S. 448 (1814); Scott v. Guernsey, 48 N. Y. 121 (1871), Jarman on Wills, *supra.*